

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

BENJAMIN K BATES
Claimant

BENCHWOOD INC
Employer

APPEAL 17A-UI-09861-JC
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 10/23/16
Claimant: Respondent (2R)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The claimant filed an appeal from the September 22, 2017, (reference 07) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. An in-person hearing was held in Des Moines, Iowa, on October 18, 2017. The claimant participated personally. The employer participated through Dave Carey, general manager. Employer witnesses included Marcos Lovan, assistant manager and Blake Van Den Broeke, line cook. Subpoenaed witness, Tristan Ziehe, line cook, also testified.

The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The employer operates a restaurant named Benchwarmers. The claimant was employed full-time as a line cook and was separated from employment on September 5, 2017, when he was discharged for insubordination. The claimant began his employment through prior ownership in April 2017, and effective June 2017, the employer assumed new ownership. Since separation, the claimant has been in school full-time through DMACC for welding.

Prior to the claimant's discharge, he had no written warnings, and under the new ownership, no written rules or handbooks had been provided. The undisputed evidence is on September 3,

2017, around the employer's 9:00 closing time, the claimant refused to make a pizza. Present at the time of the pizza incident were Kyle, a dishwasher, Dani, a bartender, the claimant, and Tristan Ziehe, also a cook. Through the serving window in which the kitchen passes food to wait staff and bartenders, the claimant and Mr. Ziehe were instructed by Dani to make a pizza immediately. Both Mr. Ziehe and the claimant agreed the request was rude and demanding; whether Dani's request was also accompanied by profanity is disputed.

The claimant had almost finished cleaning the kitchen for the night, as it was closing time. He responded to Dani that he wasn't going to make the pizza because of the way she talked to him, which he deemed disrespectful. Mr. Ziehe said "if he (the claimant) isn't going to make it, I'm not making it either" in a gesture of solidarity. Kyle, the dishwasher, made the pizza for Dani. Thereafter, Mr. Ziehe witnessed the claimant yelling and screaming about the incident with Dani, referring to her as a bitch. It is unknown if Dani heard the claimant.

Both Kyle and Dani reported the pizza incident to Marcos Lovan, the assistant manager. Along with the pizza incident, Kyle reported the claimant had referred to Dani as a bitch and "c—t", as well of the fact he had taken extended breaks during his shift on September 3, 2017. When the claimant called Mr. Lovan on September 5, 2017 to inquire about paychecks arriving, Mr. Lovan inquired with the claimant about the events on September 3, 2017. The claimant responded by screaming so loudly that Mr. Lovan could not make out words. The claimant was upset because he felt the employer was "always coming at me." Mr. Lovan informed the claimant he needed to come talk to him at the restaurant or else he was fired, and the claimant ended the call by hanging up on Mr. Lovan.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$1,415.00, since his separation. The administrative record also establishes that the employer did participate in the September 19, 2017, fact-finding interview or make a witness with direct knowledge available for rebuttal. Dave Carey participated.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The disqualification shall continue until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

Iowa Admin. Code r. 871-24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). Administrative agencies are not bound by the technical rules of evidence. *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 630 (Iowa 2000). A decision may be based upon evidence that would ordinarily be deemed inadmissible under the rules of evidence, as long as the evidence is not immaterial or irrelevant. *Clark v. Iowa Dep't of Revenue*, 644 N.W.2d 310, 320 (Iowa 2002). Hearsay evidence is admissible at administrative hearings and may constitute substantial evidence. *Gaskey v. Iowa Dep't of Transp.*, 537 N.W.2d 695, 698 (Iowa 1995).

The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* The administrative law judge also had the ability to observe the witnesses' appearance and conduct in person during the hearing. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). "The use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct, even in the case of isolated incidents or situations in which the target of abusive name-calling is not present when the vulgar statements are initially made." *Myers v. Emp't Appeal Bd.*, 462 N.W.2d 734 (Iowa Ct. App. 1990). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants

denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

On September 3, 2017, the claimant refused to make a pizza upon request by Dani, a bartender. The claimant was a cook and it was his job to make pizzas upon request. The claimant had already cleaned the kitchen for the night and deemed the manner in which Dani demanded or requested the pizza to be disrespectful, and so he refused. The administrative law judge does not condone rude or demanding conduct to fellow co-workers in the workplace. However, while the claimant may not have liked the manner in which he was addressed by Dani, the reasonable response would have been to make the pizza, so that the employer's customer was not adversely impacted, and then report Dani's conduct, if the claimant felt it was inappropriate, to management. Instead, the claimant refused and then began yelling in the kitchen, referring to Dani as a bitch. The claimant deliberately refused to perform an essential function of his job.

Then, when questioned about the incident two days later by manager, Marcos Lovan, the claimant began screaming and using profanity to Mr. Lovan, to the extent Mr. Lovan credibly testified he could not understand the claimant through the screaming, before the claimant hung on him. Mr. Lovan's inquiry of the events that unfolded on September 3, 2017, in light of the claimant's refusal to do his job and screaming of profanity in the kitchen thereafter, was reasonable as well. The claimant's response of yelling or screaming at Mr. Lovan was wholly unprofessional, and disrespectful to his manager.

The question of whether the refusal to perform a specific task constitutes misconduct must be determined by evaluating both the reasonableness of the employer's request in light of all circumstances and the employee's reason for noncompliance. *Endicott v. Iowa Dep't of Job Serv.*, 367 N.W.2d 300 (Iowa Ct. App. 1985). Based on the evidence presented, the administrative law judge concludes the employer's expectation that the claimant make pizzas upon request, (even if he didn't like the way they were requested), was reasonable, as was an expectation that the claimant would conduct himself with professionalism when questioned by his manager. The claimant failed to present persuasive evidence to mitigate his non-compliance.

Therefore, the administrative law judge concludes the claimant's refusal to make a pizza upon request, coupled with his use of screaming profanity first on September 3, 2017 in the kitchen and then to Marcos Lovan on September 5, 2017, were contrary to the reasonable expectations of the employer. The administrative law judge is persuaded the claimant knew or should have known his conduct on September 3 and 5, 2017 could result in discharge, even without prior warning. Misconduct has been established. The claimant is denied benefits.

Iowa Code § 96.3(7)a-b provides:

7. Recovery of overpayment of benefits.

- a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) (a) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding § 96.8, subsection 5. The employer shall not be relieved of charges if benefits are paid because the employer or an agent of the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. This prohibition against relief of charges shall apply to both contributory and reimbursable employers.

(b) However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to § 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to § 602.10101.

Iowa Admin. Code r. 871-24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if un rebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

Because the claimant's separation was disqualifying, benefits were paid to which he was not entitled. The claimant has been overpaid benefits in the amount of \$1,415.00. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits if it is determined that it did participate in the fact-finding interview. Iowa Code § 96.3(7), Iowa Admin. Code r. 871-24.10. In this case, the claimant has received benefits but was not eligible for those benefits. The employer satisfactorily participated in the scheduled fact-finding interview by way of Dave Carey. Since the employer did participate in the fact-finding interview, the claimant is obligated to repay the benefits he received and the employer's account shall not be charged.

REMAND: The issue of whether the claimant is able to and available for work while a full-time student is remanded to the Benefits Bureau of Iowa Workforce Development for an initial investigation and determination.

DECISION:

The September 22, 2017, (reference 07) decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant has been overpaid benefits in the amount of \$1,415.00 and is obligated to repay the benefits. The employer's account is relieved of charges associated with the claim.

REMAND: The issue of whether the claimant is able to and available for work while a full-time student is remanded to the Benefits Bureau of Iowa Workforce Development for an initial investigation and determination.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/scn